

STATE OF MICHIGAN  
COURT OF APPEALS

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VICTORIA BUCKLEY,

Plaintiff-Appellee/Cross-Appellant,

v

CHAKRAPANI RANGANATHAN, M.D., and  
NEUROLOGICAL REHABILITATION  
ASSOCIATES, P.C.,

Defendant-Appellant/Cross-  
Appellee.

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UNPUBLISHED

April 1, 2003

No. 230262

Macomb Circuit Court

LC No. 98-003-167-NH

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

COOPER, P.J. (*concurring*).

I concur with my colleagues but write separately to emphasize the double standard that currently exists between plaintiffs and defendants in medical malpractice cases as it applies to affidavits of merit or meritorious defense.

The Legislature requires plaintiffs and defendants to file, respectively, an affidavit of merit or an affidavit of meritorious defense in medical malpractice claims. MCL 600.2912d; MCL 600.2912e. Notably, neither of these statutes set forth a penalty for noncompliance. However, recent case law has determined that a plaintiff's failure to timely file a proper affidavit of merit requires dismissal with prejudice. *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000); *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703; 706-707; 620 NW2d 319 (2000). Conversely, a defendant's similar failure to timely file an affidavit of meritorious defense does not automatically warrant a default. *Kowalski v Fiutowski*, 247 Mich App 156, 163; 635 NW2d 502 (2001). Rather, a trial court is afforded discretion to determine the appropriate sanction for the defendant's failure to comply with the statute. *Id.* at 165-166.

I believe trial courts should be afforded discretion in fashioning remedies for either parties' noncompliance with the statute. I agree with the majority that default is too harsh a penalty for failure to comply with the affidavit of meritorious defense. Contrary to existing Michigan law, I also believe that dismissal is far too harsh a penalty for failure to file an affidavit of merit.

The remedy for failure to file a timely affidavit of merit was judicially and not statutorily created. The discrepancy between the treatment of the plaintiff versus the defendant is blatant. Our system of justice should not countenance such an inequitable application.

/s/ Jessica R. Cooper